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No. 86-1777

In The
Supreme Court of the United States
October Term, 1986

FRANK J. SZOPKO,
Petitioner,

vs.

KINSMAN MARINE TRANSIT COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

BRIEF OF RESPONDENT KINSMAN MARINE TRANSIT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of Michigan properly concluded that Defendant-Respondent, Kinsman Marine Transit Company,* as shipowner, could not be liable under the Jones Act, 46 U.S.C. Sec. 688, to Plaintiff-Petitioner, Frank J. Szopko, a seaman, for injuries sustained by Szopko while ashore, off-duty and on his own time, and while on dock property over which Kinsman had no dominion or control.

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* The parent company of Respondent, Kinsman Marine Transit Company, is The American Ship Building Company. Respondent's affiliates and subsidiaries (other than wholly owned subsidiaries) are Tampa Shipyards, Incorporated; Nashville Bridge Company; Great Lakes International Corporation; ABG Aviation, Inc.; Mid-South Galvanizing Company; Whale Steel, Inc.; and American Seafood Processors, Inc.

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BRIEF OF RESPONDENT KINSMAN MARINE TRANSIT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This action was brought by Plaintiff-Petitioner, Frank J. Szopko ("Szopko"), a seaman and crew member of the vessel, S.S. Buckeye Monitor, against Defendant-Respondent, Kinsman Marine Transit Company ("Kinsman"), Szopko's employer and the owner of the vessel. As a crew member of the S.S. Buckeye Monitor, Szopko was employed as a wiper working in the engine room. On September 2, 1973, the vessel was berthed and secured at a dock in Conneaut, Ohio owned and operated

by the Pittsburg and Conneaut Dock Company (the "dock company"). The dock company was unloading a cargo of taconite pellets from the vessel, using dock company equipment, including its conveyor system located on the dock. No member of the crew of the vessel participated in the unloading procedures.

As a crew member on the Buckeye Monitor, Szopko worked an 8 hour work day from 8:00 a.m. to 4:00 p.m. On the evening of September 2, 1973, at approximately 6:30 p.m., Szopko went ashore. When he left the ship, Szopko had completed his work for the day and was off duty and on his own time. Szopko testified at trial as follows:

Q. Now at the end of that eight hours, you were done working for that particular day?

A. Yes sir.

Q. And I believe you testified you left the ship for to go the store about six-thirty that evening?

A. Yes sir.

Q. Now at that particular time, you left the ship, after you had worked all day, you are off duty on your own time?

A. Yes sir, yes sir.

Q. And when you went ashore, and at the time you were injured, you were off duty not working?

A. Yes sir.

On leaving the vessel, it was necessary to travel one–half mile across the dock company's property before reaching the public roadway. The dock company had designated a route to follow across its property for those persons leaving or returning to a vessel. A portion of the prescribed route intersected the conveyor system. To pass the conveyor system which ran on the dock parallel to the vessel, the dock company provided a grated pedestrian bridge or walkway over the conveyor with steps for ascending and descending on either side. The dock company's designated

route to and from the vessel provided for crossing over the conveyor by use of this grated bridge. The bridge was several feet from the Buckeye Monitor's ladder which was used by crew members to board and depart from the vessel.

After leaving the vessel at approximately 6:30 p.m., Szopko remained ashore from four to six hours. While ashore, he visited two or three bars and drank alcoholic beverages. Szopko was observed drinking at one of the bars by other members of the Buckeye Monitor's crew, including Thomas Adamzak and Glen Johnson, who were also on shore leave. Adamzak described Szopko at that time as loud and staggering and his speech was slurred.

At approximately 11:30 p.m., Szopko started to return to the vessel. He walked across the dock company's property, following the dock company's marked footpath. Szopko met Adamzak and Johnson, who were also returning to the vessel. Szopko was walking slowly and kept falling behind. According to both Adamzak and Johnson, Szopko was unsteady in his walk and his speech was slurred. Johnson had to return to duty at midnight. Szopko instructed Adamzak and Johnson to leave him alone and told them he could make it back to the ship on his own. Adamzak and Johnson left Szopko and walked ahead.

As Szopko continued his return, he reached the pedestrian bridge crossing the conveyor. At the second trial of this matter, Szopko claimed that he slipped and fell on or near the stairway of the conveyor bridge, sustaining an injury to his head due to darkness and the presence of taconite. Until this testimony, Szopko had on all previous occasions, including one week after the occurrence, at his deposition and at the first trial, consistently stated that he had no recollection of the accident or how he got hurt. No one saw Szopko fall at the conveyor bridge.

Adamzak, who crossed the conveyor bridge shortly before Szopko, stated that although the lighting was dim, he had no trouble seeing where he was going. Adamzak did

not recall seeing debris or anything else around the area of the crosswalk, and he did not recall having difficulty going over the crosswalk. Similarly, Johnson stated that from the time he left Szopko until he reached the vessel, he encountered no difficulty or other problems in walking on the crosswalk.

Harold Bean, an employee of the dock company who observed the scene immediately following Szopko's injury, stated that the condition of the dock was normal and nothing was irregular. He further stated that the area was fairly well lit by the presence of floodlamps.

Upon Szopko's arrival at the vessel after his claimed fall, he was taken to the emergency room of Brown Memorial Hospital. His treating physician observed Szopko to be boisterous and difficult to control. He stated that Szopko was intoxicated. Szopko remained in the hospital for five days. Upon his release, he returned to the vessel. His treating doctor found no skull fractures or neurological problems and indicated that Szopko could return to work.

The First Trial

In the first trial, judgment was entered on Szopko's Jones Act claim for $ 9,000.00. The jury verdict and judgment were based on total damages of $ 180,000 with a finding of 95% contributory negligence on the part of Szopko. Szopko appealed on the ground that the trial judge improperly engaged in an off-the-record discussion with a juror during the trial. On this basis alone, the appellate court reversed and remanded the case for a new trial. 94 Mich. App. 64, 292 N.W.2d 486 (1980).

The Second Trial

On remand and retrial, the jury returned a verdict for Szopko in the amount of $ 247,000, based on total damages of $ 380,000 and 35% contributory negligence. On January 15, 1982, the trial court entered judgment

on the verdict. Kinsman then moved for judgment notwithstanding the verdict or, in the alternative, a new trial. The motion was denied on May 20, 1982.

Kinsman appealed from the trial court's judgment and from the order denying its post-trial motion. On June 27, 1984 the Court of Appeals affirmed the judgment of the trial court.

Kinsman then filed its application for leave to appeal to the Supreme Court of Michigan. On June 26, 1985, that court granted the application. On December 17, 1986, the Supreme Court of Michigan reversed both lower courts. Thereafter, Szopko filed a Motion for Rehearing. On February 3, 1987, the Supreme Court of Michigan denied the motion. Szopko then filed this Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

On December 17, 1986, the Supreme Court of Michigan rendered its decision and reversed both the trial and appellate courts. *Szopko v. Kinsman Marine Transit Company*, 426 Mich. 653, 397 N.W.2d 171 (1986) (hereinafter "*Szopko*, 397 N.W.2d at ___"). It correctly concluded that the lower courts "clearly erred" in applying the law to the evidence and that Kinsman was entitled to a directed verdict at trial. (*Szopko*, 397 N.W.2d at 174.) In reversing the lower courts, the Supreme Court of Michigan analyzed in detail the two elements of the Jones Act claim of Szopko and properly held that: 1) Szopko was not in "the course of his employment" at the time of his injury; and 2) Kinsman did not owe Szopko a duty for an injury sustained on property over which it had no control when he was ashore on his own personal time. (*Szopko*, 397 N.W.2d

at 176, 177, 180.)[1]

Szopko's Petition for Writ of Certiorari is fundamentally ill-conceived. It does little more than thrust a multitude of cases upon this Court which are all clearly distinguishable and that have absolutely no bearing on the issues. Szopko then attempts to integrate several distinct areas of maritime law, misconstrues them, mixes them thoroughly with totally dissimilar cases decided under the Federal Employer's Liability Act, and serves up the resulting confusion in the apparent hope that he can disguise the weaknesses of his arguments. Nor are Szopko's arguments new, since each was exhaustively considered and properly rejected by the Supreme Court of Michigan. Thus, for no greater reason than his disagreement with that state court decision, Szopko now asks this Court to review this case even though the Michigan court properly applied age-old principles of maritime law.

When stripped of its rhetoric, it is beyond question that Szopko's Petition for Writ of Certiorari satisfies none of the standards of Supreme Court Rule 17. To the contrary, as compellingly demonstrated in this brief, the Supreme Court of Michigan has not decided a federal question in a way which conflicts with the decision of another state or federal court on the same matter. Nor has it decided an important question of federal law which has not been, but should be, settled by this Court, or that is in conflict with applicable decisions of this Court.

Thus, there simply is no basis upon which to invoke

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[1] Based upon these two holdings, the state court did not deem it necessary to address or decide the other errors claimed by Kinsman, including that both lower courts erred by failing to conclude that: 1) the jury instructions given on liability and damages were erroneous; and 2) Szopko's treating physician was available to testify as a live witness and, therefore, his prior testimony should not have been read to the jury. (*Szopko*, 397 N.W.2d at 180.)

the certiorari jurisdiction of this Court, since it is a long-established principle that it will not review the decision of a state court which presents no substantial federal question. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Zucht v. King*, 260 U.S. 174 (1922); *Millingar v. Hartupee*, 73 U.S. (6 Wall.) 258 (1867); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 314 (1902); *Abbott v. National Bank of Commerce*, 175 U.S. 409 (1899); and *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Accordingly, review by this Court is plainly unwarranted and the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. Applicable Maritime Principles Governing This Action.

Because both the law and logic compel the conclusion that Szopko has no remedy under the Jones Act, 46 U.S.C. §688, Szopko is forced to rely on cases decided under the totally inapplicable maritime law doctrines relating to: 1) maintenance and cure; 2) unseaworthiness; and 3) longshoremen claims. As he has done throughout his case, Szopko refuses to acknowledge that these other types of maritime claims involve *entirely distinct theories* of recovery from the Jones Act, and that each has a completely *separate* standard of liability and interpretive case law which have no applicability here.

For instance, a seaman's claim for maintenance and cure (which is akin to a claim for workman's compensation) or for unseaworthiness incorporates concepts in the nature of strict liability. Unlike the Jones Act, claims for maintenance and cure and unseaworthiness do not raise issues of negligence or fault on the part of the shipowner. *See e.g., Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724, 730-731 (1943) ("Created thus with the contract for employment, the liability [for maintenance and cure], unlike that for indemnity . . . created by the Jones Act, in no sense is predicated on the fault or negligence of the

shipowner"); *Liner v. J.B. Talley & Co., Inc.*, 618 F.2d 327, 330 (5th Cir. 1980) (a seaman's claim for unseaworthiness involves a "type of liability without fault, to be considered separately from his [the shipowner's] Jones Act duty of reasonable care.")

Similarly, a longshoreman's claim is brought by a different type of maritime worker who is not employed by the shipowner and who resides ashore with no permanent association to a vessel. Further, a longshoreman's rights are governed by an entirely different statute – the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* This act involves a different concept of negligence from that which is employed under the Jones Act and specifically excludes from its coverage a "member of a crew of any vessel" *i.e.*, seamen, such as Szopko. 33 U.S.C. §§ 905(b) and 903(a)(1). *See e.g., Scindia Steamship Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981).

In contrast to the above-mentioned maritime claims, under the Jones Act, an injured person *must* be a seaman and *must* prove *both:* 1) that he was injured in the course of his employment; and 2) that his injury resulted from the shipowner's negligence, that is, from the negligent breach of some cognizable legal duty owed to the seaman by the shipowner. *See e.g., Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129 (1959).

Thus, because each of these several maritime theories is *entirely distinct*, the only maritime decisions relevant to this case are those defining the standard for liability *under the Jones Act.* Therefore, Szopko's repeated reliance on cases which involve either maintenance and cure, unseaworthiness or longshoremen claims is wholly misplaced. *See e.g., Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724 (1943) (maintenance and cure); *Warren v. United States*, 340 U.S. 523 (1951) (maintenance and cure); *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963) (longshoreman claim and unseaworthiness).

Szopko's further search to find some authority for his argument by citing numerous cases decided under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), is no more availing. While under certain circumstances FELA cases can be considered in analyzing Jones Act claims, it is equally well established that a court "cannot always automatically apply FELA law to seafaring operations when to do so would be incompatible with principles developed under the general maritime law." 1B Benedict, Admiralty (7th ed), ch. 3, § 29, n. 21 pp. 3-206-3-208.[2]

Moreover, *not a one* of the FELA cases cited by Szopko involves facts even remotely similar to those present here. On the contrary, all of those cases involve injuries sustained by employees while: 1) on premises over which the employer did exercise control or assume responsibility; or 2) the employee was doing the work of the employer pursuant to the employer's orders; or 3) both — circumstances totally different from the facts of this case. *See e.g., Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963); *Kooker v. Pittsburgh & Lake Erie Railroad Co.*, 258 F.2d 876 (6th Cir. 1958); *Carter v. Union Railroad Co.*, 438 F.2d 208 (3d Cir. 1971). In complete contrast to those cases, Szopko, at the time of his injury, was: 1) ashore, on *his own time*; 2) *not* doing the work of his employer pursuant to his employer's orders; and 3) on property over which Kinsman exercised *no* dominion or control. Therefore, the FELA cases cited by Szopko have absolutely no bearing either on Szopko's claim or the issues before this Court.

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[2] FELA case law need not be consulted or considered here, since clearly applicable maritime law interpreting the Jones Act is dispositive. As demonstrated later in this brief, courts have consistently held, in case after case under the Jones Act, that a shipowner's duty *does* not extend to a seaman, like Szopko, who was off work, on his own time and on property over which a shipowner, such as Kinsman, had no dominion or control.

II. The Supreme Court of Michigan Properly Concluded That Kinsman Was Not Liable To Szopko Under The Jones Act.

A. The Supreme Court of Michigan Properly Concluded That Szopko Was Not in the Course of His Employment at the Time of His Injury.

As a review of the opinion of the Supreme Court of Michigan convincingly demonstrates, its decision properly adheres to decades-old maritime law and is in complete harmony with virtually every court in the country which has decided a Jones Act claim under similar facts. Boiled down to its essence, Petitioner's attack on that decision constitutes little more than his disagreement with longstanding decisions of this Court. More specifically, Szopko takes issue with the holding of the state court in which it concluded that:

> for purposes of a Jones Act claim, a seaman is in the course of his employment if he is doing the work of his employer pursuant to his employer's orders, *Braen, supra,* or when the nature of the service rendered and its relation to the operation of the vessel, *O'Donnell, supra,* is of such a nature that a seaman may be deemed in the course of his employment. We decline to adopt a more precise rule since this determination should be made case by case.

(*Szopko,* 397 N.W.2d at 176.)

However, as a review of the above-quoted language plainly shows, it is nearly the verbatim words and holdings of this Court's decisions in both *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129 (1959) and *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943). More specifically, as this Court stated in *Braen*, a seaman is acting in the "course of his employment" if, at the time of his injury, "he was doing the work of his employer pursuant to his employer's orders." *Id.* at 133. Similarly, as this Court stated in *O'Donnell*, and as the Supreme Court of

Michigan properly held, a seaman's right of recovery under the Jones Act depends on " . . . the nature of the service and its relationship to the operation of the vessel . . . " 318 U.S. 42-43.[3]

Thus, as the foregoing demonstrates, Szopko is wholly wrong in his arguments and criticisms of both the decision of the Michigan Supreme Court and the law it applied. Instead, it is beyond question that the state court fulfilled its responsibilities in every respect, both by enunciating with exacting precision the law as established by this Court and then applying it with equal clarity to reverse two erroneous lower court decisions which had relied on "distinguishable or discredited cases." (*Szopko*, 397 N.W.2d at 179.)

Szopko does not, and indeed cannot, deny that he was required to prove under the Jones Act that he was "in the course of his employment" at the time of his injury. He instead attempts to demonstrate, by the use of *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724 (1943) and *Warren v. United States*, 340 U.S. 523 (1951) (both of which were decided exclusively under the unrelated maritime principles of *maintenance and cure*), that a seaman is *always* in the "course of his employment" for *Jones Act* purposes when he is on shore leave. This wholly unqualified and inaccurate assertion constitutes nothing less than the most fundamental misrepresentation of Jones Act law.

To the contrary, in *Braen v. Pfeifer Oil Transportation*

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[3] Significantly, although most of Szopko's Petition for Writ of Certiorari is directed to the "course of his employment" element of a Jones Act claim, nowhere does his counsel acknowledge that Szopko *admitted* at trial that he was "done working," "off duty" and "on his own time" at the time of his injury. (*Szopko*, 397 N.W.2d at 176.) Based upon these admissions alone, it is clear that Szopko was not doing the work of his employer pursuant to his employer's orders and was not in the course of his employment.

Co., 361 U.S. 129 (1959), this Court made it absolutely clear that a shipowner *cannot* be liable *under the Jones Act* for injuries suffered by a seaman who is not engaged in work pursuant to his employer's orders. In *Braen*, this Court unquestionably held that the seaman was in the course of his employment for Jones Act purposes *only* because he was "doing the work of his employer pursuant to his employer's orders." *Id.* at 133. Thus, despite Szopko's mischaracterization of its holding, a plain reading of the opinion in *Braen* demonstrates beyond any question that the absolute, decisive holding is as follows:

> Petitioner [Braen] in the present case was ordered by a superior to perform some carpentry work on a raft which lay between the lighter and the dock. Petitioner was injured, as we have said, while on the catwalk attempting to move the raft into position for boarding. The raft was used to facilitate chipping, painting and welding on respondent's vessels. Cf. *Grant Smith-Porter Co. v. Rohde*, 257 U.S. 469. New decking was to be installed on the raft. The fact that the raft was not presently being used to repair respondent's barge is in our view immaterial. *Petitioner was acting "in the course of his employment" at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders. No more is required by the Jones Act*, as the O'Donnell case indicates, petitioner being a seaman who was injured as a consequence of the negligence of his employer.
>
> The judgment of the Court of Appeals is reversed and the judgment of the District Court is reinstated.

Id. at 133 (emphasis supplied).

Similarly, *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943), bears no resemblance to this case. In *O'Donnell*, the plaintiff-seaman was allowed to maintain an action under the Jones Act for injuries he sustained on shore while *actively engaged in repairing ship equipment* utilized in discharging the ship's cargo. As this Court

specifically noted, the plaintiff "was *ordered by the master* to go ashore to assist in [the] repair." *Id.* at 38 (emphasis supplied). The plaintiff, therefore, *was doing the work of his employer pursuant to his employer's orders.* As previously noted, this is precisely the standard this Court later articulated in *Braen* to determine when a seaman is "in the course of his employment" and entitled to seek recovery under the Jones Act. Thus, contrary to Szopko's argument, *O'Donnell* provides no support for his contention that he should be allowed to recover for injuries occurring on shore while he was *not* working and *not* acting pursuant to his employer's orders.

Nor is it surprising that in his haste to criticize the Supreme Court of Michigan and to push this Court to substitute *his* position for the law, Szopko wholly ignores the virtually dispositive case of *In Re Petition of Atlass*, 350 F.2d 592 (7th Cir. 1965) *cert. denied*, 382 U.S. 988 (1966). In *Atlass*, on facts virtually identical to those present here, the court exonerated the shipowner from any liability under the Jones Act in an action by two intoxicated seamen who drowned while returning to their vessel from shore. In denying liability, the court properly held that the two seamen were not injured in the course of their employment. In language equally applicable to this case, the *Atlass* court stated:

> Assuming that [the two seamen in question] were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course [of employment] when they took themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. *Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated.*

Id. at 597 (emphasis supplied).

The facts in this case are even more compelling. Here, when Szopko first left the vessel *and* at the time of his injury, he was, by his own admission, "off duty," on his "own time" and "not working." While ashore, he became intoxicated and was injured during this completely personal excursion. Significantly, the Supreme Court of Michigan recognized all of these facts in properly concluding that:

> [G]iven the facts of the present case, we find that plaintiff was not in the course of his employment at the time of the injury. By his own admission, he was off duty and on his own time. He did not have to return to work until 8:00 a.m. the next morning. He was returning from several hours of drinking, clearly a personal excursion.

(*Szopko*, 397 N.W.2d at 176.) Therefore, the state court correctly held that there simply was no factual or legal basis for either of the lower courts to conclude that Szopko was "in the course of his employment" at the time of his injury. (*Szopko*, 397 N.W.2d at 176.)

Szopko's confusion over the law appears to arise from his failure (or unwillingness) to recognize that the mere status of being a seaman does *not* automatically result in liability under the Jones Act. In a single sentence, the Supreme Court of Michigan succinctly stated what amounts to a near total response to Szopko's argument. After citing *O'Donnell*, the court concluded that:

> We *cannot* ignore the phrase "in the course of his employment," because it was intended to mean what it says.

(*Szopko*, 397 N.W.2d at 175) (emphasis supplied). Here, it is beyond question that the Supreme Court of Michigan properly concluded that Szopko, who by his own admission, "was off duty and on his own time," and was returning from a "personal excursion," was most certainly not "doing the work of his employer pursuant to his employer's orders at the time of the injury." (*Szopko*, 397 N.W.2d at 176.)

Szopko's contention that this case is "indistinguisha-

ble" from the pre-*Braen* decision in *Marceau v. Great Lakes Transit Corp*, 146 F.2d 416 (2d Cir. 1945), is patently wrong. In fact, *Marceau* is far different. In that case, the vessel owner, *unlike Kinsman here*, was the *lessee* of the dock on which the seaman was injured. Thus, as the *Marceau* court found, the injury occurred "on property in the *possession and under the control of*" the shipowner. *Id.* at 417-18 (emphasis supplied). Moreover, the injured seaman was returning to the vessel *pursuant to his employer's orders* to perform his duties as cook, in contrast to Szopko, who was returning in an intoxicated condition from a personal excursion some eight hours before his next shift began. Finally, the hazardous condition on the dock that caused the plaintiff to fall had been directly created by the conduct of ship employees when they swept debris off the vessel onto the dock, in contrast to here, where it was due solely to on-shore activity in which the shipowner's employees did *not* participate. *Id.* at 419. These first two distinctions between *Marceau* and this case were both specifically recognized by the Supreme Court of Michigan. (*Szopko*, 397 N.W.2d at 175 and fn. 7.)

In sum, the evidence is undisputed and the law is overwhelming. Szopko was *off duty, not working* and on his *own time* when his accident occurred and, therefore, was not doing the work of his employer pursuant to his employer's orders. Therefore, he was not "in the course of his employment." Accordingly, on this basis alone, the decision of the Supreme Court of Michigan was correct.

B. The Supreme Court of Michigan Properly Concluded That Kinsman Owed No Duty to Szopko for an Injury Sustained on Property Over Which It Had No Control When He Was Ashore on His Own Personal Time.

Szopko also criticizes the Supreme Court of Michigan's holding that Kinsman owed no duty to Szopko when he was injured while not working, off the ship for purposes of his own and on premises over which the shipowner had

no dominion or control. Once again, a review of well-established law demonstrates that the court's analysis and conclusion were absolutely correct.

As early as 1925, in the landmark decision of *Todahl v. Sudden & Christenson*, 5 F.2d 462 (9th Cir. 1925) (cited with approval by this Court in *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 736-7 (1943)), the court held that the shipowner's duty to an injured seaman to provide a safe place to work:

> did not extend to [the seaman's] protection when going beyond the premises of his employment for purposes of his own and over premises of which his employers had no dominion or control.

Id. at 464.[4] The *Todahl* court applied this principle to affirm the dismissal of a Jones Act claim brought by a seaman who was ashore for personal reasons and injured when he slipped into a hole on a wharf on his return to the ship.

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[4] Curiously, Szopko apparently fails to realize the absolute contradiction between his reliance on *Aguilar* and his criticism of the principles established in *Todahl* and its progeny. As the Supreme Court of Michigan recognized, and as discussed *infra*, the *Todahl* line of cases clearly establish that Kinsman had no duty to Szopko and, therefore, could not be negligent. *Aguilar* involved injuries to seamen while ashore on shore leave. The *Aguilar* Court's *sole* concern was whether the seamen in that case could set forth valid claims for maintenance and cure. Yet, in differentiating shoreside claims for maintenance and cure from shoreside claims under the Jones Act, this Court in *Aguilar* specifically cited and placed its approval on *Todahl:*

> [C]onsequently, the fact that the shipowner might not be liable to the seaman in damages [under the Jones Act] for the dockowner's negligence, *cf. Todahl v. Sudden & Christenson*, 5 F.2d 462 (C.C.A.), does not relieve him of his duty of maintenance and cure.

318 U.S. at 736-737.

For over sixty years since *Todahl*, this rule has been uniformly applied by virtually every other court which has addressed the point, *including in numerous cases involving seamen returning to the vessel from shore leave. See e.g. Bates v. Prudential-Grace Lines, Inc.*, 497 F.2d 900 (9th Cir.) (adopting the lower court opinion reported at 375 F. Supp. 774) *cert. denied*, 419 U.S. 1009 (1974) (shipowner granted judgment notwithstanding the verdict; shipowner's duty to provide a seaman with a safe place to work does not extend beyond the gangway when the seaman is not in the performance of his duties); *Paul v. United States*, 205 F.2d 38 (3d Cir.), *cert. denied*, 346 U.S. 888 (1953) (shipowner not liable to seaman injured on dock walkway some 100 feet from vessel; shipowner cannot be guilty of negligence with respect to a condition existing in an area that the shipowner neither owned nor controlled): *Wheeler v. West India S.S. Co.*, 103 F. Supp. 631, 634 (S.D.N.Y. 1951), *aff'd.* 205 F.2d 354 (2 Cir.) (per curiam), *cert. denied*, 346 U.S. 889 (1953) (shipowner not liable to seaman returning to the ship from shore leave for unsafe condition located beyond the gangway and not under its control when the seaman was there for his own purposes); *Dangovich v. Isthmian Lines, Inc.*, 218 F. Supp. 235 (S.D.N.Y. 1963) *aff'd.* 327 F.2d 355 (2d Cir. 1964) (per curiam) (claim of seaman injured on dock while returning to ship from shore leave dismissed; no duty on shipowner to provide a safe means of transportation across the dock, to provide alternative route or to warn against hazards); *Martinez v. Steamship Hawaiian Retailer*, 1963 A.M.C. 1188, 1190 (S.D. Ga. 1963) (summary judgment granted to shipowner; not liable for seaman's injuries sustained on dock when seaman ashore on leave; no duty beyond ship's gangway and no duty to inspect the dock or warn of hazards); *Broussard v. Marine Transport Lines, Inc.*, 369 F. Supp. 103 (E.D. Tex. 1974) (summary judgment for shipowner granted because no duty to seaman injured while returning to vessel from shore leave; no duty to provide safe means of transport between the ship and place

of seaman's amusement nor any duty to warn of conditions beyond gangway over which it had no control); *Anderson v. Lykes Brothers Steamship Co.*, 1978 A.M.C. 1959, 1961-62 (S.D. Tex. 1978) (shipowner not liable to seaman injured in a fall on dock while returning to the vessel from shore leave since no duty to inspect the dock, correct any hazards before granting shore leave, or to provide transportation ashore); *Young v. Matson Navigation Company*, 1983 A.M.C. 1593 (Cal. App. 1982) (summary judgment for shipowner granted in seaman claim involving fall while returning to ship from shore leave; no duty on shipowner to seaman going beyond premises of his employment for his own purposes and over premises which shipowner had no dominion and control; no duty to inspect dock or warn of dangers there).[5]

Most recently, in *Ugarte v. United States Lines, Inc.*, 64 N.Y.2d 836 (1985), the highest court of New York also recognized all of these well-established principles of maritime law. In *Ugarte*, a seaman went ashore on leave for a few hours while his ship was docked for loading and unloading cargo in West Germany. On his return, he slipped and fell while climbing between two railroad boxcars and over a platform or coupling which was wet from rain. The seaman sued the shipowner under the Jones Act, alleging that the shipowner was negligent in failing to correct or warn of a hazardous condition on the pier. The trial court denied the shipowner's motion for summary

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[5] While it appears that the Sixth Circuit has never confronted the precise issue, it has clearly acknowledged that the duty to make the dock area safe and prevent dockside injuries is the dockowner's, *not* the shipowner's. *See Sims v. Chesapeake & Ohio R.R. Co.*, 520 F.2d 556, 561 (6th Cir. 1975) ("Wharfinger . . . owes duty to provide safe means of ingress and egress to berthed ships"). *See also Bailey v. Texas Co.*, 47 F.2d 153 (2d Cir. 1931) (cited with approval in *Sims*) (dockowner found liable; claim against shipowner dismissed).

judgment. The Appellate Division reversed, granted the motion, and dismissed the complaint.

On appeal, New York's highest court affirmed the entry of summary judgment. In so doing, that court noted there was no evidence that the shipowner had control of the area where the injury occurred. Significantly, it also rejected in total the seaman's arguments there, and Szopko's contentions here, that the shipowner had a duty to warn and remedy potentially hazardous conditions on the pier. As the *Ugarte* court noted:

> Plaintiff argues, alternatively, that the shipowner has an obligation to take measures on the ship to warn of conditions on the pier, and that the shipowner has an absolute duty to repair and warn of potentially hazardous conditions in areas through which a seaman must pass in order to reach the ship. *On the facts presented, neither contention has been shown to be an obligation imposed by general maritime law.*

64 N.Y.2d at 838 (emphasis added.)

Significantly, this Court recently declined the opportunity to even address, let alone change, this long-settled maritime law when it *denied* certiorari in *Ugarte*. *Id.*, *cert. denied*, 106 S. Ct. 142 (1985).

In complete conformity with this overwhelming body of law, the Supreme Court of Michigan correctly held that:

> [A] defendant's duty to provide a seaman with a safe place to work *does not extend* beyond the immediate vicinity of the gangway when the seaman is not in the performance of his duties. *Bates*, *supra*; *Todahl*, *supra*.

(*Szopko*, 397 N.W.2d at 180) (emphasis supplied). The state court also found that Kinsman had neither "real" nor "*de facto*" control of the dock area or dock side condition, since "the evidence clearly showed that the dock company was solely responsible for the area where the injury occurred." (*Szopko*, 397 N.W.2d at 178.) In applying the law to this

evidence, the Supreme Court of Michigan properly concluded that:

> the trial court erred in failing to direct a verdict in defendant's favor, since the defendant did not owe the plaintiff a duty of care under the facts of this case.

(*Szopko*, 397 N.W.2d at 177.)

Nor do the cases relied upon by Szopko provide any support for his Petition for Writ of Certiorari. For example, Szopko cites *Hamilton v. Marine Carriers Corp.*, 332 F. Supp. 223 (E.D. Pa 1971). *Hamilton*, however, is a thoroughly discredited case which stands in total conflict with every other court which has addressed this issue, including the decision in *Paul v. United States*, 205 F.2d 38 (3d Cir.) *cert. denied*, 346 U.S. 888 (1953), from its *own* Third Circuit Court of Appeals. (*See e.g. Bates v. Prudential-Grace Lines, Inc.*, 497 F.2d 900 n.1 (9th Cir.) (adopting the lower court opinion reported at 375 F. Supp. 774) *cert. denied*, 419 U.S. 1009 (1974); *Young v. Matson Navigation Company*, 1983 A.M.C. 1593, 1595 (Cal. App. 1982).)

The reasons for rejecting *Hamilton* are legion. The *Hamilton* court relied upon a Fifth Circuit Court of Appeals opinion which was subsequently *reversed* by this Court on the very point on which *Hamilton* drew its support. That Fifth Circuit case, *Law v. Victory Carriers, Inc.*, 432 F.2d 376 (5th Cir. 1970), was cited by the *Hamilton* court as support for extending the shipowner's duty under the Jones Act to dangerous conditions on the dock. However, in *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), this Court *reversed* the Fifth Circuit and *refused* to extend the shipowner's duty to a marine worker injured *on the dock beyond the gangplank* by equipment *owned* by the stevedoring company and *not* the shipowner, holding that:

> respondent Law [plaintiff] was not injured by equipment that was part of the ship's usual gear or that was stored on board. The equipment that

> injured him was in no way attached to the ship, the forklift was not under the control of the ship or its crew, *and the accident did not occur aboard the ship or the gangplank.*

404 U.S. at 21 (emphasis supplied).

In addition, the *Hamilton* court not only ignored the law as established in its own Third Circuit in *Paul* and relied on a subsequently reversed decision, but it also improperly cited two wholly distinguishable FELA cases, *Carter v. Union Railroad Co.*, 438 F.2d 208 (3d Cir. 1971) and *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963). As demonstrated below, neither *Carter* nor *Shenker* (both of which Szopko relies upon) involve the issues present here.

In *Carter v. Union Railroad Co.*, 438 F.2d 208 (3d Cir. 1971), the plaintiff was injured while traveling across a third-party's property to commence his *work* assignment. Unlike this case, however, prior to the incident, plaintiff's employer explicitly assumed responsibility over the property where the employee was injured pursuant to an indemnity agreement which provided:

> In consideration for the use of your property by Union Railroad Company employees, the Union Railroad Company [the employer] agrees to indemnify and hold harmless General Motors Corporation [the property owner] against any and all liabilities, claims, demands, suits and damages for injuries to and death of persons and damage to property caused by such use.

Id. at 209-10 n. 1. Here, in contrast, Szopko was not returning to the ship to begin work and no indemnity agreement existed between Kinsman and the dockowner whereby Kinsman assumed responsibility either for the dock or for injuries which occurred on it.

Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1 (1963), was an action by an employee against his employer-railroad. Part of the employee's *job assignment* included

assisting in the loading and unloading of mail cars. At the time of his injury, the plaintiff was actively *working* in this capacity, loading bags of mail onto a mail car. Plaintiff was injured as a result of a defective mail car door. Although the railroad car in question was owned by a third party, it was located at the station and facilities owned and maintained by the railroad. Based upon these specific and limited facts, the Court held that "the B&O [the railroad-employer] had a duty to inspect P&LE cars [the mail car] before permitting its employees to *work* with them." *Id.* at 8 (emphasis added). In contrast to *Shenker*, Szopko was not working, was on his own time and was on property over which Kinsman had no ownership or control. *Shenker*, therefore, also fails to provide any support for Szopko's position.

Szopko's reliance upon *Kooker v. Pittsburgh & Lake Erie Railroad Co.*, 258 F.2d 876 (6th Cir. 1958), another FELA case, also is misplaced. In *Kooker*, a railroad was held liable for injuries sustained by an employee when he slipped and fell on a pathway. Two critical facts, however, distinguish *Kooker* from this case. First, Kooker slipped and fell on a pathway over which *his employer exercised dominion and control. Id.* at 878. Second, Kooker was "*working* at the time of the injury." *Id.* at 878 (emphasis supplied). In stark contrast, Kinsman exercised no control over the pathway crossing the conveyor on the dock, and neither created nor maintained the pathway. Nor was Szopko working at the time, or even returning to the ship to begin work. Instead, Szopko was returning to his ship a full eight hours before his next work shift began. Thus, the facts of *Kooker* are wholly inapposite from those present here.

Nor does *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), provide any support to Szopko. Initially, Szopko is guilty of grossly misleading this Court both by his use of *Gutierrez* in general, as well as by his specific description that this Court made it clear in that case that

a shipowner may be held liable *under the Jones Act* for injuries caused by the spillage of its cargo on the dock, even though it may not "control" the dock in the more general sense. To the contrary, *Gutierrez* did *not* even involve a claim by a *seaman* and was *not decided under the Jones Act.* Rather, *Gutierrez* was a *longshoreman* who was *at work* unloading cargo from the ship at the time of his injury.

Szopko compounds his misuse of *Gutierrez* by failing to acknowledge that, as a result of the *1972* amendments to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), this *1963* decision has absolutely no current precedential value. As this Court is well aware, the 1972 amendments brought dramatic changes to a longshoreman's claim against a shipowner by *eliminating* the right to seek recovery for unseaworthiness, like the claim involved in *Gutierrez*, and by radically altering and redefining the concept of negligence, which became the sole basis of recovery after 1972. *See e.g., Scindia Steamship Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981).

Finally, *Gutierrez* is not only legally inapplicable, but factually inapposite for, among other reasons: 1) Gutierrez, who fell on loose beans spilled on the dock, was injured while performing his job duties; and 2) the dangerous condition which led to his injury (loose beans on the dock), was caused by the shipowner's conduct in allowing the cargo of beans to be discharged in dangerous and defective bagging. *Id.* at 207, 210-211. In the present case, Szopko was not working, but was on his own time. Nor was Kinsman involved in the unloading process. Finally, there is absolutely no evidence that Kinsman allowed its cargo to be discharged in a dangerous and defective condition. Once again, contrary to Szopko's assertion that *Gutierrez* supports his "Jones Act" claim, *Gutierrez* instead is both legally and factually irrelevant.

Similarly, the few Jones Act cases Szopko cites also are easily distinguishable. For instance, as previously dis-

cussed, *Marceau v. Great Lakes Transit Corp.*, 146 F.2d 416 (2d Cir. 1945), is entirely different from the present case. In *Marceau*, unlike here, the vessel was moored at a dock "which had been leased to the defendant [shipowner]." *Id.* at 417. Thus, according to the *Marceau* court, the seaman's injury on the dock occurred "on property in the possession and under the control of" the shipowner. *Id.* at 417-418. Moreover, the hazardous condition on the dock that caused the plaintiff to fall had been directly created by ship employees when they swept debris off the vessel onto the dock and not, as here, as a result solely of on shore activity in which the shipowner's employees took no part. *Id.* at 419. Furthermore, the injured seaman in *Marceau* was "acting under orders when he returned to the ship" to perform his duties as a cook (*id.* at 418), unlike Szopko, who was on his own time, returning to the ship, some eight hours before his next work shift began. Once again, Szopko simply ignores these differences between *Marceau* and the present case, any one of which demonstrates its total inapplicability.

Szopko's reliance upon *Walton v. Continental S.S. Co.*, 66 F. Supp. 836 (D. Md. 1946), is equally wrong. In *Walton*, a seaman was injured on a dock in the West Indies while returning to his ship at night. Because it was wartime (1943), the dock was totally dark in accordance with naval blackout regulations. Under these circumstances, a watchman was specifically ordered to station himself at the ship's gangway with the sole responsibility to provide light to the seamen as they made their way *up the gangway* onto the ship. Contrary to his employer's orders, the watchman was not present to provide the required light when the injury occurred. Plaintiff sought to find the gangway in the darkness, mistook a coal chute on the dock as the gangway, and fell. On this specific set of facts, the crucial issue in *Walton* , unlike here, was whether the watchman's absence, in violation of his employer's orders, resulted in the seaman being injured. Significantly, with respect to

whether the dockside hazard associated with the injury (the coal chute on the dock alongside the vessel) was caused by the shipowner's negligence, a central issue here, the *Walton* court found the shipowner had *no* responsibility, stating:

> I find *no negligence* attributable to the ship with respect to the coal chute. *It belonged to or was under the control of the dockowner.*

Id. at 839 (emphasis supplied). Thus, contrary to supporting Szopko, *Walton*, in fact, supports Kinsman.

Similarly, *McDonough v. Buckeye S.S. Co.*, 103 F. Supp. 473 (N.D. Ohio 1951), *aff'd*, 200 F.2d 558 (6th Cir. 1952) (*per curiam*), *cert. denied* , 345 U.S. 926 (1953), involves facts so different from those present here that it is wholly irrelevant. In *McDonough*, the shipowner voluntarily undertook the duty to assign a crewmember to escort a drunken seaman, who had been detained by a dock guard, across the dock and back to the vessel.

The employee specifically assigned to assist the drunken seaman failed to do his job and abandoned the seaman. As a result, the seaman drowned.

The focus of the *McDonough* court was on whether the shipowner, once having decided to intervene and provide assistance to the seaman, was then negligent in its conduct. Based upon the shipowner's misconduct in providing assistance, the district court held it liable, stating:

> [O]ne who *voluntarily* takes charge of a helpless person must exercise reasonable care for his welfare and safety.

Id. at 475-476 (emphasis supplied). The differences between *McDonough* and this case are obvious. First, *McDonough* did not involve the issue of a shipowner's responsibility for conditions on dock property not owned or controlled by the shipowner, a central issue here. Second, Kinsman did not voluntarily assume any responsibility to escort a detained seaman, or for that matter, any seaman,

including Szopko, back to the ship.

Thus, not one of the cases relied upon by Szopko provides any basis for him to recover on a Jones Act claim. To the contrary, as the Supreme Court of Michigan properly recognized, the law is overwhelmingly clear and compels the conclusion that a shipowner cannot be liable under the Jones Act for an accident occurring on property over which it exercised no dominion or control when the injured seaman was not working and on his own personal time.

Finally, Szopko's suggestion that this Court should adopt his self-created and never before recognized "shadow of the ship" test as a substitute for this overwhelmingly well-established maritime law requires only the briefest response. Not surprisingly, Szopko *does not, and cannot, cite any case in the country* to support his "shadow of the ship" test. By its singular focus on *where the injury occurred*, Szopko's self-denominated test both is wholly misdirected and in total conflict with the law as enunciated by this very Court. Instead, as established by numerous legal precedents, it is the character and nature of the activities and events giving rise to the injury complained of that are the vital and indispensable elements in determining the right to recover under the Jones Act.

Again, as this Court properly recognized in *Farrell v. United States*, 336 U.S. 511 (1949):

> . . . *what* a seaman is doing and *why* and *how* he sustains injury does not affect his right to maintenance and cure, *however decisive it may be as to claims for indemnity or for damages for negligence* [in Jones Act] *cases*.

(Emphasis supplied). (*See also O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943) where this Court held that the right of recovery under the Jones Act "depends *not on the place where the injury is inflicted*, but on the nature of the service and its relationship to the operation of the vessel . . . ." (Emphasis supplied.)) In com-

plete adherence to the decisions of this Court, the Supreme Court of Michigan properly concluded that:

> recovery under the Jones Act *does not* depend on the location of an injury ....

(*Szopko*, 397 N.W.2d at 175) (emphasis supplied).

Thus, on this issue as well, the Supreme Court of Michigan relied upon long-established law to support its absolutely correct holding that:

> a defendant's duty to provide a seaman with a safe place to work does not extend beyond the immediate vicinity of a gangway when the seaman is not in the performance of his duties.

(*Szopko*, 397 N.W.2d at 180.) For this reason as well, Szopko's Petition for Writ of Certiorari is without support and should be denied.

CONCLUSION

Szopko's status as an aggrieved litigant whose claim has been rejected on the basis of well-settled legal rules is no different from that of numerous other disappointed suitors. He offers no valid reason why this Court should grant his Petition for Writ of Certiorari and review the well-reasoned and absolutely correct decision of the Supreme Court of Michigan. Throughout this litigation, Szopko never has been able to cite a single case in which a shipowner has been held liable to a seaman under the Jones Act on facts even remotely similar to those present here. The reason for his failure is fundamental — the Jones Act never was intended to make a shipowner accountable to a seaman for an injury he sustained when not working, on his own time, and on property over which the shipowner had no dominion or control.

When boiled down to its essence, Szopko's Petition amounts to no more than a wholesale attack on well-established principles of maritime law as enunciated by virtually every court which has considered these issues.

Szopko's wholly unsupportable assertions that this Court should refuse to follow well-settled maritime law or adopt his self-created "shadow of the ship" test simply cannot serve as the basis to grant his Petition. To accept his invitation would require this Court both to ignore sixty years of authoritative case law and to construe the Jones Act in a way never before contemplated. Significantly, this Court has recently declined this same opportunity in a nearly identical case when it denied certiorari in *Ugarte v. United States Lines, Inc.*, 64 N.Y.2d 836 (1985), *cert. denied*, 106 S. Ct. 142 (1985). Similarly, the well-considered decision of the Supreme Court of Michigan should be allowed to stand as the final disposition of this action. For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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